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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 583

MUSA J. EWAYS and JEANETTE M. EWAYS, his wife,

Petitioners,

v.

BOARD OF ROAD SUPERVISORS OF EXETER TOWNSHIP, Exeter Township, Berks County, Pennsylvania, and EXETER TOWNSHIP MUNICIPAL AUTHORITY, of Exeter Township, Berks County, Pennsylvania, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR RESPONDENTS IN OPPOSITION

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INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provision Involved	2
Statement	3
Argument	7
I. The Court Below Did Not Decide the Federal Question Untimely Raised by Petitioners and Its Decision Rests on an Adequate State Ground	8
II. The Question Sought to be Reviewed is Not an Important or Substantial Question of Federal Law	10
III. The Decision Below is Clearly Correct	12
Conclusion	17

CITATIONS

Cases: PAGE

Abrams Will, 419 Pa. 92, 213 A. 2d 638 (1965) 9

Bailey v. Anderson, 326 U.S. 203 (1945) 10

Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441 (1915) 11

Blumenschein v. Pittsburgh Housing Authority, 379 Pa. 556, 109 A. 2d 331 (1954) 8

Evans v. West Norriton Township Municipal Authority, 370 Pa. 150, 87 A. 2d 474 (1952) 4

Hyam v. Upper Montgomery Joint Authority, 399 Pa. 446, 160 A. 2d 539 (1960), cert. denied 364 U.S. 288 . . 12, 15

Parker v. Philadelphia, 391 Pa. 242, 137 A. 2d 343 (1958) 12

Taylor v. Philadelphia Parking Authority, 398 Pa. 9, 156 A. 2d 525 (1959) 10

Constitution:

U. S. Const., Amendment 14, Section 1 2

Statutes:

Pennsylvania Municipality Authorities Act of 1945, Pa. Stat. Ann. title 53 §§ 301-322 4

28 U.S.C. § 1257(3) 2, 9

Miscellaneous:

Rule 41(b), Federal Rules of Civil Procedure 11

Rule 23(1)(f), Supreme Court Rules 9

Rule 56(4), Supreme Court Rules 17

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Opinions Below

The memorandum of reasons for decision of the Court of Common Pleas of Berks County, Pennsylvania (R. 192a-195a), is unreported. The opinion of the Supreme Court of Pennsylvania (Appendix to Petition, pp. i-iii) is reported at 422 Pa. 169 (1966).

Jurisdiction

The judgment of the Supreme Court of Pennsylvania was entered on June 24, 1966 (Appendix to Petition, pp.

i-iii). The jurisdiction of this Court is invoked by Petitioners under 28 U.S.C. § 1257(3).

Questions Presented

1. Whether a Writ of Certiorari should be granted where the question sought to be reviewed was raised for the first time by Petitioners in their brief before the state supreme court, was not mentioned by Petitioners in oral argument before the state supreme court, was not passed upon by the state supreme court and the decision of the state supreme court rests on adequate state grounds.

2. Whether a state court's grant of a nonsuit upon failure to prove a cause of action upon which relief could be granted constitutes a denial of due process guaranteed by the Fourteenth Amendment to the United States Constitution.

Constitutional Provision Involved

The pertinent provisions of Amendment 14, Section 1 of the United States Constitution are set forth in the Petition at page 2.

STATEMENT

Petitioners instituted an action in equity in the Court of Common Pleas of Berks County, Pennsylvania, seeking to enjoin the Respondents herein from proceeding with the financing and construction of a sanitary sewage collection system and sanitary sewage treatment facilities for the Township of Exeter, Berks County, Pennsylvania (hereinafter referred to as the "Township"). Petitioners' complaint in equity alleged fraud on the part of the Board of Supervisors of the Township in concealing from Exeter Township, Berks County, Authority the existence of a certain engineering report and further alleged abuse of discretion on the part of the Board of Supervisors of the Township and Exeter Township, Berks County, Authority in determining the scope of the sewage project.

The correct names of the Respondents herein are the Board of Supervisors of the Township of Exeter, Berks County, Pennsylvania, and Exeter Township, Berks County, Authority (hereinafter referred to as the "Authority") (R. 71a).

In 1958 the Board of Supervisors of the Township engaged Mast Engineering Company, Inc. (hereinafter referred to as "Mast") to prepare a feasibility report for the purpose of sewering limited areas of the Township (R. 155a, 158a). Petitioner Musa J. Eways at all times relevant to this proceeding has been the president and sole shareholder of Mast (R. 153a, 154a). In April of 1959 Mast transmitted to the Township its feasibility report (hereinafter referred to as the "Mast Report"), prepared by Petitioner Musa J. Eways, containing alternative sewage plans and cost estimates (R. 87a, 88a). On July 17, 1961, the Board of Supervisors of the Township terminated the agreement between the Township and Mast for engineering services relating to sewage collection and sewage disposal facilities (R. 158a-159a).

In 1962, the Board of Supervisors of the Township engaged Gannett Fleming Corddry and Carpenter, Inc., Harrisburg, Pennsylvania (hereinafter referred to as "Gannett"), to prepare a feasibility report for a comprehensive sewage collection and treatment project and on July 18,

1963, Gannett submitted its feasibility report to the Township (R. 45a, 46a, 72a). In February of 1964, the Authority was incorporated and organized[1] and thereafter numerous public meetings were held by it, in conjunction with the Board of Supervisors of the Township, to review and discuss the sewer project proposed in the Gannett feasibility report of 1963 (R. 55a-58a, 69a). On May 17, 1965, the Authority received bids for the construction of the proposed sewage collection system and sewage disposal system and subsequently accepted the bids of the lowest bidders (R. 48a, 53a). On June 10, 1965, the Authority received a bid from the investment banking firm of C. C. Collings and Company, Inc., Philadelphia, Pennsylvania, in behalf of itself and other investment banking firms, for the purchase of $5,550,000 aggregate principal amount of its sewer revenue bonds and sewer assessment revenue bonds to finance a portion of the costs of the sewage project (R. 47a, 53a, 55a, 91a, 92a).

Petitioners commenced the within action on June 25, 1965, by filing a complaint in equity in the Court of Common Pleas of Berks County, Pennsylvania (R. 3a-7a). The Respondents filed an answer to the complaint in equity containing New Matter averring, inter alia, that the sewer project had been approved by the Pennsylvania Department of Health, the Delaware River Basin Commission, the Public Health Service of the United States Department of Health, Education and Welfare and that the sewer project constituted a sound, feasible and economically justifiable program to meet the present and reasonably foreseeable sewerage needs of the Township (R. 8a-22a). Petitioners replied to Respondents' New Matter on July 16, 1965.

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[1] The Authority was incorporated pursuant to provisions of the Pennsylvania Municipality Authorities Act of 1945, as amended and supplemented, Pa. Stat. Ann. title 53 §§ 301-322, and has the power to acquire, construct, own, operate and lease sewers, sewer systems and sewage treatment works, including works for treating and disposing of industrial waste. The Act's validity under the state constitution has been upheld by the Pennsylvania Supreme Court, see *Evans v. West Norriton Township Municipal Authority*, 370 Pa. 150, 87 A. 2d 474 (1952).

At trial, Petitioners totally failed to support the allegation that the Board of Supervisors of the Township had fraudulently concealed the Mast Report from the Authority. The evidence introduced by Petitioners conclusively established that prior to incorporation of the Authority the Board of Supervisors of the Township reviewed and discussed the Mast Report with all persons who subsequently were appointed to the Authority (R. 58a-59a, 70a). The evidence introduced by Petitioners also conclusively established that at a public meeting of the Authority held on May 6, 1964, at which all Authority members were present, two of the three Supervisors of the Township were in attendance and the Mast Report and the feasibility report made by Gannett in 1963 were analyzed and discussed (R. 58a, 68a, 69a, 81a). The evidence introduced by Petitioners further established that the comparative merits of the Mast Report and the feasibility report prepared by Gannett in 1963 were the subject of discussion by the Authority and residents of the Township at several public meetings during 1964 (R. 64a, 68a, 81a).

In support of the allegation of abuse of discretion, Petitioner Musa J. Eways testified that in his opinion the sewering of three areas included within the scope of the Respondents' sewer project was not economically warranted (R. 113a, 114a, 180a, 181a), and that certain sewer lines "serve no economically useful purpose" (R. 138a). Respondent Musa J. Eways further testified that in his opinion certain areas within the scope of the Respondents' sewer project were more sparsely populated than other areas and that it was his "feeling" that population increase in those areas would be rather negligible (R. 179a, 180a).

Respondent Musa J. Eways testified that one of the proposed sewer lines included in the Respondents' project ran parallel to an existing sewer line owned and operated by a municipality authority not a party to this suit and that sewage collected in such existing line was treated at a sewage treatment plant owned and operated by a municipality not a party to this suit and that the use of such existing line was subject to the approval of such parties (R. 115, 150a-151a).

Upon conclusion of the presentation of Petitioners' case, Respondents moved for a nonsuit. After argument on the motion and review of the evidence, the Chancellor entered a decree granting the nonsuit on the basis that " * * * the Court being of the opinion that said evidence, viewed in the light most favorable to plaintiffs, is insufficient to sustain the averments of the complaint which would entitle plaintiffs to the relief sought * * *." (R. 190a).

After argument and review of the sufficiency of the evidence, the trial court en banc denied Petitioners' motion to take off the nonsuit. Following appeal to the Supreme Court of Pennsylvania by Petitioners, the trial court entered a memorandum opinion (R. 192a-195a).

The purported federal question raised here by Petitioners was initially raised by Petitioners in their brief to the Supreme Court of Pennsylvania and was not mentioned by Petitioners in oral argument before the Supreme Court of Pennsylvania. Without expressing any view as to the untimely raised federal question, the Supreme Court of Pennsylvania unanimously affirmed the decision of the trial court in granting the nonsuit at the conclusion of Petitioners' case, stating " * * * The sole disagreement between the parties lies in the manner by which appellees have elected to proceed, and, more specifically, with the size of the proposed system.*** Our examination of the record leads us to conclude, as did the court below, that the gravamen of appellants' suit involves no more than a challenge to the wisdom and desirability of the project as proposed by appellees. The record fails to disclose bad faith, fraud, abuse of power, or arbitrary or capricious conduct on the part of appellees. ***" (Appendix to Petition, pp. ii-iii).

ARGUMENT

As will be detailed, the court below correctly decided the only question properly presented to it, i.e., whether, as a matter of state law, Petitioners' evidence, viewed in the light most favorable to Petitioners, was sufficient to sustain the allegations that Respondents were guilty of fraud and capricious abuse of discretion.

The court below did not pass upon any federal question involving the alleged constitutional right to have the Respondents present their proofs when the Petitioners failed to establish a prima facie case, since that question was raised for the first time in Petitioners' brief to the Pennsylvania Supreme Court and was not mentioned by Petitioners in oral argument before the Pennsylvania Supreme Court.

On the record of this case, the decision of the court below is clearly correct and there is no basis for review of that decision by this Court. No litigant has a constitutional right to have the opposing party present its case when the litigant has failed to prove a claim upon which relief can be granted. Consequently, no substantial federal question would be raised by this appeal even if Petitioners had properly presented their claim under the Constitution of the United States to the court below.

I.

THE COURT BELOW DID NOT DECIDE THE FEDERAL QUESTION UNTIMELY RAISED BY PETITIONERS AND ITS DECISION RESTS ON AN ADEQUATE STATE GROUND.

The sole question decided by the Supreme Court of Pennsylvania was that Petitioners' evidence, tested by state standards, totally failed to establish a cause of action upon which relief could be granted. The law in Pennsylvania governing the judicial review of actions of governmental bodies that involve acts of discretion is clear, settled and not disputed by Petitioners. In *Blumenschein v. Pittsburgh Housing Authority*, 379 Pa. 566, 109 A. 2d 331 (1954), the Supreme Court of Pennsylvania clearly enunciated the controlling rule which has been consistently followed in Pennsylvania (379 Pa. at 572-573, 109 A. 2d at 334-335):

> "* * * By a host of authorities in our own and other jurisdictions it has been established as an elementary principle of law that courts will not review the actions of governmental bodies or administrative tribunals involving acts of discretion, in the absence of bad faith, fraud, capricious action or abuse of power; they will not inquire into the wisdom of such actions or into the details of the manner adopted to carry them into execution. It is true that the mere possession of discretionary power by an administrative body does not make it wholly immune from judicial review, but the scope of that review is limited to the determination of whether there has been a manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency's duties or functions. That the court might have a different opinion or judgment in regard to the action of the agency is not a sufficient ground for interference; *judicial* discretion may not be substituted for *administrative* discretion. * * *".

Applying this rule to the instant case, the court below stated:

> "Our examination of the record leads us to conclude, as did the court below, that the gravamen of appellants'

> suit involves no more than a challenge to the wisdom and desirability of the project as proposed by appellees. The record fails to disclose bad faith, fraud, abuse of power, or arbitrary or capricious conduct on the part of appellees. In the absence of evidence of such conduct, we find no basis for disturbing the determination made below." (Appendix to Petition, p. iii).

This holding is fully consistent with controlling state law and constitutes an unassailable ground for decision and disposition of the case.

Petitioners' effort to invoke this Court's jurisdiction under the provisions of 28 U.S.C. § 1257(3) is totally specious. Petitioners unavoidably concede that the purported federal question involving denial of due process sought to be reviewed here was not properly raised before the court below by their total failure to comply with Rule 23(1)(f) of this Court. In fact, the purported federal question raised here by Petitioners was not raised before the trial court, although Petitioners had an opportunity to raise the question before the Chancellor on argument of the motion for a nonsuit and before the trial court en banc upon argument of Petitioners' motion to take off the nonsuit.

Following complete failure on two opportunities to raise the purported federal question before the trial court, Petitioners initially raised the question in their brief to the Pennsylvania Supreme Court and did not mention the question in oral argument before that court. The Pennsylvania Supreme Court's refusal to entertain and pass upon Petitioners' assertion in their brief that the grant of a nonsuit constituted a denial of the constitutional right to a full hearing is entirely consistent with that court's rule that matters not raised in or considered by the trial court cannot be invoked on appeal, even though they involve constitutional questions. *Abrams Will*, 419 Pa. 92, 213 A. 2d 638 (1965).

Plainly revealing no decision below as to the federal question sought to be reviewed here, the record in this case defeats the instant Petition for Certiorari. It is axiomatic that a federal question not properly raised before state

courts comes too late for consideration in this Court unless the state courts actually entertain and expressly decide the question. *Bailey v. Anderson*, 326 U.S. 203 (1945). In short, this Court sits to review significant federal questions actually decided by state courts, not undecided questions untimely raised by counsel.

II.

THE QUESTION SOUGHT TO BE REVIEWED IS NOT AN IMPORTANT OR SUBSTANTIAL QUESTION OF FEDERAL LAW.

Assuming for the purpose of argument that the question sought to be reviewed is properly here, it is nonetheless totally without merit as an important or substantial question of federal law which this Court should settle. Petitioners contend that the courts below failed to consider the sufficiency of their proof. The trial court in granting the nonsuit and later in affirming the grant of the nonsuit plainly stated that it had viewed the evidence in the light most favorable to Petitioners (R. 190a, 194a). This was entirely in accord with controlling Pennsylvania law governing the weight to be given to a plaintiff's proof in passing upon a nonsuit. *Taylor v. Philadelphia Parking Authority*, 398 Pa. 9, 156 A. 2d 525 (1959). The propriety of the nonsuit was clearly before the court below which prefaced its analysis of the case with the statement that it was considering whether the refusal of the trial court en banc to remove the nonsuit was error (Appendix to Petition, p. ii).

Petitioners' contention that the decision below is against the weight of the evidence is, in essence, the argument made by every plaintiff who appeals from the dismissal of his action. Through a process of reasoning totally unsupported by authority Petitioners assert that this standard argument assumes constitutional dimensions when a taxpayer is a party to litigation. A review of the history of this case conclusively reveals that at the state level Petitioners were given every opportunity to be heard and every procedural safeguard required by due process.

Petitioners' astonishing contention that they have been denied their day in court is conclusively rebutted by the procedural history of this case. Petitioners presented their evidence in open court over a period of several days. The question of the sufficiency of their evidence was argued and reviewed before the Chancellor, an experienced and able trial judge. The sufficiency of their evidence was again reviewed, upon argument of Petitioners' motion to take off the nonsuit, before the trial court en banc—all of the judges of the Court of Common Pleas of Berks County, Pennsylvania. Upon appeal to the Supreme Court of Pennsylvania, the sufficiency of the evidence was reviewed for the third time and Petitioners' contention that they had made out a prima facie case was unanimously rejected. In the face of this record, Petitioners now argue they have been denied due process. It is not surprising to Respondents that Petitioners cite no authority for their proposition that they have been denied their day in court, for it is totally without merit. There is obviously no constitutional right to put a defendant to his proof in a case where the plaintiff, be he taxpayer or private litigant, has failed to prove a cause upon which the relief sought can be granted. Indeed, if that were the law, Rule 41(b) of the Federal Rules of Civil Procedure, which authorizes federal courts to dismiss an action at the conclusion of a plaintiff's case when no right to relief has been shown, would be unconstitutional.

The issue raised here by Petitioners is plainly so narrow that under no circumstances can it be said to be an issue of substance, so special and important as to warrant review by this Court. An ultimate decision on the issue if made by this Court would, of necessity, be so limited to the peculiar facts of this case that it could affect only the parties to this litigation, for Petitioners do not ask this Court to review any of the substantive law governing the disposition of the case, they simply ask this Court to review again the weight of their evidence. Particularly appropriate to Petitioner's contentions is the recognition by Mr. Justice Holmes that "there must be a limit to individual argument in such matters if government is to go on." *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 445 (1915).

III.

THE DECISION BELOW IS CLEARLY CORRECT.

Petitioners' cause of action in this case was based upon the allegations that the Board of Supervisors of the Township had fraudulently concealed the Mast Report, submitted to the Board of Supervisors of the Township in 1959, from the Authority and that the Respondents were guilty of abuse of discretion in determining the scope of the proposed sewer project. An analysis of Petitioners' evidence will indicate that the court below was clearly correct in finding that Petitioners totally failed to support either of these allegations and to overcome the presumption in favor of the propriety of Respondents' conduct[1].

A. The allegation of abuse of discretion.

Petitioners' evidence in support of the allegation of abuse of discretion consisted entirely of the testimony of Petitioner Musa J. Eways who had prepared the Mast Report submitted to the Board of Supervisors of the Township in 1959 (R. 86a, 89a) and who was discharged by the Township in 1961 (R. 158a, 159a).

1. Despite testimony by Petitioner Musa J. Eways that the Mast Report was not a suitable alternate to Respondents' program, Petitioners now argue that they have shown by the mere existence of an outdated and admittedly inaccurate engineering report that there is a less expensive alternate to Respondents' sewer program. On this point Petitioner Musa J. Eways testified that one of the several cost estimates for providing sanitary sewage collection and treatment facilities for limited areas of the Township as contemplated in 1959 by his Mast Report was $1,095,000 (R. 96a). He further testified that in his opinion all of the facilities contemplated by the Mast Report could have been

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[1] See *Hyam v. Upper Montgomery Joint Authority*, 399 Pa. 446, 160 A. 2d 539 (1960), cert. denied 364 U.S. 288, and *Parker v. Philadelphia*, 391 Pa. 242, 137 A. 2d 343 (1958), for the presumption that municipal officers properly act for the public good.

constructed in 1965 at a cost of approximately $2,000,000 (R. 96a-97a). When asked to produce, as subpoenaed, the calculations upon which this $2,000,000 figure was based, Eways stated that there were no figures or calculations to support the figure (R. 170a-171a). Eways admitted under cross examination that he had understated the cost estimates contained in the Mast Report submitted to the Township in 1959, which was the basis of his $2,000,000 "rough estimate", by at least 33⅓% (R. 175a-177a).

By the use of comparative figures Petitioners infer in their Petition that the Eways' plan of 1959 is an alternative to the present project of Respondents. This inference is conclusively rebutted by the evidence. Under cross examination Eways testified as follows (R. 143a-144a):

> "Q. Am I correct, Mr. Eways, that you are urging upon the court here your 1959 report, with updated estimate figures, as a suitable alternative to the presently proposed plan?
>
> A. No, I am not.".

In view of the above testimony and testimony that there were various areas of the Township that were not covered by the Mast Report which Petitioner Musa J. Eways would now recommend for sewering (R. 113a), Petitioners' attempt before this court to contrast updated costs of sewering under the Mast Report with the Respondents' project is deceptively misleading and belied by the record.

2. Petitioners' contention that their proofs establish that the Respondents' engineers have predicated the project upon unrealistic growth based upon a population increase of 1000% is totally without support in the record. Petitioners infer that Respondents' project is designed to serve 88,000 people and use this population figure as the basis for their percentage of population increase. The credibility of the figures presented to this Court by Petitioners are completely refuted by testimony of Petitioner Musa J. Eways (R. 143a):

"Q. Now, as you understood it, is the presently proposed system designed to serve 88,000 people?

A. As I understood it?

Q. Yes.

A. No, I never understood that.

Q. I refer you to page 8 of Exhibit 3. Is there an 88,000 figure appearing on that page?

A. There is.

Q. What is that in reference to?

A. All it says is 'Ultimate' and 'Total' of areas A, B, C, D, E and F.

Q. Is that the projection used for the total ultimate population of the entire township?

A. That's correct.

Q. And only three of the six drainage areas of the township shown on that page are the subject of this present proposal; is that correct?

A. That's correct.".

3. The fact that one of Respondents' proposed sewer lines would run parallel to an existing sewer line owned and operated by a separate municipality authority does not constitute evidence of abuse of discretion. The evidence clearly indicates that sewage collected in the existing line is treated at a plant owned and operated by a municipality adjoining the Township and would not connect to the sewage treatment plant to be constructed by Respondents, as would the line proposed by Respondents (R. 150a-151a). As found by the trial court, the exhibits introduced into evidence by Petitioners at trial plainly show that the line proposed by Respondents serves a totally different area than does the existing line and would enable the Respondents to have a completely integrated sewage collection system (R. 193a-194a). Petitioner Musa J. Eways testified that parallel municipal sewage collection lines frequently occur when there are several municipalities in the same drainage area—each with its own integrated sewage collection system

and sewage treatment plant—and that he had designed and built several such parallel lines, at least one of which involved a substantially greater length than Respondents' proposed line (R. 149a).

Petitioner Musa J. Eways testified that his objection to Respondents' project was based entirely on economic grounds (R. 114a). He stated that, in his opinion, in three limited areas of Respondents' project sanitary sewers were not economically warranted (R. 114a). In Petitioners' view economic considerations rather than public health considerations govern the decision as to the proper scope of a sanitary sewer project. Petitioners freely admitted that they were not familiar with the ground water geology in the Township, had no knowledge as to the number of private water supply sources in the Township which were bacteriologically polluted and had no knowledge of the number of private sewage disposal systems in the Township which were not functioning properly (R. 124a-125a).

Respondents submit that all of the evidence submitted on the issue of abuse discretion by Petitioners, viewed in the light most favorable to Petitioners, does not establish abuse of discretion on the part of Respondents. Petitioners differ with Respondents as to the economic feasibility of sewering several limited portions of the Township. Respondents' project is based upon a desire to eliminate a hazard to public health and Petitioners' objections are based solely on economics. Under controlling Pennsylvania law Petitioners' economic objections do not constitute grounds for reversing the discretion and responsibility vested by law in Respondents. As stated in *Hyam v. Upper Montgomery Joint Authority, supra* (399 Pa. at 455, 160 A. 2d at 544-545):

> "* * * The legislature has vested in both the Authority and the Borough officials the power and responsibility of conducting governmental affairs in their respective areas: to such officials on the local level is given the right to exercise both judgment and discretion within the sphere of the legislative grant. Courts should be loathe to interfere with or control the performance of the duties of such municipal officials: fraud, official misconduct, arbitrary and capricious abuse of power or

discretion by municipal officials alone justify judicial intervention.".

B. The allegation of fraud.

Petitioners produced no evidence in support of the allegation that the Board of Supervisors of the Township fraudulently concealed the Mast Report from the Authority. The trial court noted that during the hearings the issue of fraud was abandoned (R. 193a) and the court below, after examining the record, found that at trial no evidence was adduced by Petitioners in support of the allegation of fraud (Appendix to Petition, p. ii).

The uncontroverted evidence established that prior to incorporation of the Authority the Board of Supervisors of the Township discussed the Mast Report with all persons who were subsequently appointed to the Authority (R. 58a-59a, 70a).

The uncontroverted evidence also established that at a public meeting held on May 6, 1964, shortly after the incorporation of the Authority, two of the three supervisors of the Township, all members of the Authority and various residents of the Township compared, reviewed and discussed the comparative merits of the Mast Report and Gannett's feasibility report of 1963, which was the basis of the present project (R. 58a, 64a, 68a-69a, 81a). The evidence introduced by Petitioners further established that the comparative merits of the Mast Report and Gannett's feasibility report were the subject of discussion by the Authority and residents of the Township at several public meetings in 1964 (R. 64a, 68a, 81a).

On the basis of the record of this case, there is obviously no merit to the contention that the Mast Report was fraudulently concealed from the Authority.

It is of critical importance to Respondents that the instant Petition for Certiorari be denied at the earliest possible date. The mere pendency of the Petition for Certiorari as effectively precludes Respondents from proceeding with their

sewage project as would an injunction, for Respondents can not finance this urgently needed public improvement so long as this litigation is pending. Petitioners in an attempt to delay and frustrate this public improvement, which is urgently needed to eliminate existing public health hazards, have reached outside the record of this case to fabricate a federal question which would serve as the basis of prolonging this litigation. Respondents respectfully submit that under the circumstances of this case they are entitled to reasonable damages for delay, as contemplated by Rule 56(4) of this Court.

CONCLUSION

For the reasons stated it is respectfully submitted that this Petition for a Writ of Certiorari should be denied and that reasonable damages for delay should be adjudged to Respondents.

Respectfully submitted,

SAMUEL B. RUSSELL,
ROBERT MOORE,
Attorneys for Respondents.

October 20, 1966.